SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1117

E. ARTHUR BARROWS, ESTHER BARROWS, JOHN B. LONERGAN, BIG BEAR ROCK and MATERIALS COMPANY, B. R. SEAMAN, also known as BERNARD R. SEAMAN, individually, B. R. SEAMAN as General Manager of Big Bear Rock and Materials Company, B. R. SEAMAN as President and General Manager of Berni-Lee, Inc., a California Corporation doing business under the name of Big Bear Rock and Materials, BERNI-LEE, INC., a California Corporation, H & W LEASING, a California Corporation, DOUGLASS HAYES and JOYCE ANN HAYES,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which affirmed an injunctive order of the United States District Court for the Central District of California.

Opinion Below.

The District Court did not file an opinion. The opinion of the Court of Appeals for the Ninth Circuit (Appendix I, *infra*) is in slip form and has not been published in the advance sheets at this time.

Jurisdiction.

1. The jurisdiction of this Court is invoked to review a final decision of the Court of Appeals for the Ninth Circuit on the grounds that (1) the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, and (2) the decision of the Court of Appeals for the Ninth Circuit has decided a federal question in conflict with applicable decisions of this Court and the due process clause of the United States Constitution.

2. The date of the judgment sought to be reviewed is December 20, 1968. It was entered December 20, 1968.

3. A timely petition for rehearing was filed in the Court of Appeals and was denied by order made January 28, 1969. Mandate has been stayed to and including March 6, 1969 by order of the Court of Appeals dated and filed February 4, 1969.

4. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. 1254(1).

Questions Presented.

The United States seeks by its Complaint filed June 8, 1967 to (1) temporarily and permanently enjoin petitioners from mining and processing mineral substances upon their unpatented mining claim located in 1953 and

operated since then, (2) to secure an accounting for minerals mined and sold, and (3) to recover damages for trespass and restoration. The petitioners basically assert the right to mine the mineral in good faith under the federal mining law until the time a final agency determination as to the validity of the claim is made by the Secretary of the Interior upon a pending government administrative contest against the claim. Three questions of law are presented:

1. Whether the doctrine of abstention, established long ago by this Court and applied by it to land department proceedings, and which doctrine requires the courts to hold their hand and refrain from taking up adjudication of controversies the determination of which has been confided to an administrative agency, is breached by a preliminary injunction issued in such an action for the purpose of suspending actual mining because of the pendency of the agency proceeding to determine the possessory right and title of the contestee.

2. Whether the possessory and property rights of an unpatented mining claim locator and owner granted him by the federal mining laws (30 U.S.C. 22, *et seq.*) to enter upon the open public domain and there explore for mineral, locate and claim a valuable mineral deposit and hold and own the same by a mining claim, are taken from him contrary to and without due process of law by adherence to the doctrine of abstention when the application for such an injunction, the pendency of the agency contest proceedings, and present or proposed active mining form the sole basis for the injunctive order and the claimant is not permitted because of the doctrine to show the validity of his claim to the courts until the agency proceedings are final and ripe for review.

3. Whether it is equitable to enjoin such mining because of the pendency of the agency contest proceeding when the "marketability rule" approved by this Court in *United States v. Coleman, et al.*, 390 U.S. 599, decided April 22, 1968, as interpreted by the Department of the Interior since that time, requires a continuing ability on the part of the claimant to demonstrate profitable marketability for mineral from the claim by a showing of *present* value in the market in an economic sense, and suspension of production from the mine can only have the result of suspending or ending the position of the mine's production in the market.

Constitutional Provisions, Statutes and Regulations Involved.

1. The 5th Amendment to the Constitution of the United States, reading as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Act of May 10, 1872, Section 1, 17 Stat. 91, 30 U.S.C. 22, reading as follows:

> "Except as otherwise provided all valuable mineral deposits in lands belonging to the United States,

both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

3. Sections 1840.0-9(a) and (d) of Title 43, Code of Federal Regulations, reading as follows:

"(a) Effect of decision pending appeal. Normally a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. However, when the public interest requires, the officer to whom an appeal may be or is taken may provide that a decision or any part of it shall be in full force and effect immediately. . . (d) Power of Secretary. Nothing in this part shall be construed to deprive the Secretary of any power conferred upon him by law."

Statement of the Case.

The basis for federal jurisdiction in the District Court was 28 U.S.C. 1345. The Complaint in this action [R. 2] is founded upon the government's claim of ownership of the land in the claims and the alleged invalidity of the mining location. There has been no suggestion of wrongful use of the claim for purposes

other than mining nor of fraud or bad faith. The government's sole ground advanced for the preliminary injunctive relief was (1) that the claim had been declared void by a hearing examiner's decision (appealed and not effective) in the land office; and (2) that continued mining would cause irreparable injury.

The United States, on filing the suit, moved the District Court for a preliminary restraining order. After a hearing the motion was denied [R. 162], for the reason that the validity of the claim was being determined in the administrative contest proceedings and that until the administrative proceedings had been completed it would be inequitable to grant injunctive relief.

The government thereupon moved the Court for a conditional restraining order [R. 169]. Petitioners opposed and also moved for a summary judgment of dismissal of the action [R. 227] for lack of jurisdiction. The Court denied petitioners' motion and granted the conditional restraining order from which the appeal was taken. The order restricted the owners and operators to mining and removing only that material on the claim which would be seasonably replenished by natural means [R. 310].

Grout Creek Gravel Pit Placer claim was located in 1953, almost 2 years to the day before the "common varieties" law (30 U.S.C. 611) was enacted. It is situated in the delta created by the flow of the waters of Grout Creek, near the point at which they reach Big Bear Lake, in San Bernardino County, California [R. 74, 93 and 168]. It was owned and operated for its valuable mineral deposits of sand and gravel which, when washed in a commercial aggregates plant, meet portland

cement concrete aggregates specifications of the U.S. Forest Service and of the Division of Highways of the State of California, the material being equal or superior to other aggregates materials found in the area. It has been used unwashed in the area for all concrete purposes except school construction [R. 26, 70 and 77]. Since 1960 there has been a large sand and gravel mining and processing plant on the claim along with the necessary sand and gravel pits created by mining [R. 38, 41 and 82]. An application for patent has not been filed. Much of the area in the vicinity of the claim is patented ground, as to which the Forest Service cannot control use [R. 77 and 94]. Some of the private ownerships in the area are in commercial and business use [R. 73]. Big Bear Lake itself is privately owned [R. 10].

The government initiated the administrative contest against the owners of the claim March 18, 1964, through the filing of a contest complaint in the Riverside Land Office of the Bureau of Land Management of the Department of the Interior, asserting that there had been no discovery of a valuable mineral deposit prior to July 23, 1955 (the effective date of the so-called Multiple Use Act, 30 U.S.C. 601 *et seq.*), that the involved mineral was a "common variety" within the meaning of the act, and that the land was non-mineral in character [R. 21]. A hearing examiner made detailed findings of fact by his decision dated March 14, 1966, to the effect, in part [R. 26, 27, 28, 29 and 77], that in the period from the location of the claim up until July 23, 1955, when the common varieties amendment became effective, Mr. Barrows operated the claim and was known to other persons in the area who were en-

gaged in the sand and gravel business, as one who was in that business; the Barrows operations, while small, showed a profit found by the examiner as ranging from $3.50 to $4.60 per cubic yard of the sand and gravel material sold, with costs of digging, loading, and delivery varying from $0.40 to $1.50 per yard, including the services of Mr. Barrows at $1.50 per hour and depending upon the point of delivery; in each of the two years in question prior to July 23, 1955, some quantities of sand and gravel on the claim were extracted, removed, and marketed by Mr. Barrows at a substantial profit of from $2.50 to $4.60 per yard, and some were sold by him at the claim for $0.75 per yard; and in the period at least 600 cubic yards of sand and gravel were mined from the claim and sold.

The examiner decided that the claim was null and void for lack of what he termed a "timely" (prior to July 23, 1955) discovery of a valuable sand and gravel mineral deposit under the general mining laws. He thus concluded [R. 26] that there had been a failure by the locators to discover a valuable deposit of sand and gravel within the claim between the date of the location in 1953 and the effective date of the common varieties amendment of July 23, 1955, and that the material for which the claim was located by Barrows and which was mined by him and in the mining operations engaged in thereafter on the claim was a common variety within the meaning of Sec. 3 of the act of July 23, 1955 (30 U.S.C. sec. 611) and therefore not subject to consideration as a valuable mineral discovery so as to validate the claim after July 23, 1955.

The contestees took a timely appeal to the Director of the Bureau of Land Management under applicable ad-

ministrative regulations [R. 70-71], and the office of the Director affirmed on the asserted authority of this Court in *Coleman (supra)*. The contestees then appealed to the Secretary of the Interior, in whose office the matter is pending, undecided. The appeals had the effect of suspending the effect of the decision pending the final agency decision (43 C.F.R. 1840.0-9(a)). This action was filed June 8, 1967, while the administrative contest was pending on the appeal to the Director.

The intent of the injunctive order having been to restrict and limit the mining claimants and those in active possession under them from mining sand and gravel in excess of such as is "normally replenished seasonally" by the forces of nature within the claim, petitioners were materially prejudiced. After the making of the original conditional order, the District Judge amended [R. 28, Vol. 3, Suppl. Trans.] the form of his Order to prohibit mining and removal of material below a certain line, established under his Order to define the contour of the sand pit as of a date in December, 1967. Mining was necessarily stopped by the effect of the Order in February, 1968, because of the absence at that time of a flow of water in Grout Creek sufficient in force and volume to bring replenishing material onto the claim area. The Order of December 7, 1967 had the practical effect of enjoining defendants, pending trial or further order of the Court, from using the claim as a mining claim under the federal mining laws.

Reasons for Granting the Writ.

1. The doctrine of abstention, requiring the court to hold its hand while such administrative proceedings are in progress (see *Best v. Humboldt Placer Mining*

Co., 371 U.S. 344), would seem to require that no proceedings be taken in or by such a civil action until the final agency action determines the title and right of possession of the claimants under their mining claim. These are the issues assigned by law to the Secretary.

The District Court's action, affirmed by the Court of Appeals, was taken to preserve the opposite of *status quo*—to *suspend* mining and removal of the mineral—and in private litigation between individuals advancing conflicting claim locations or other possessory controversies over the same ground, the relief might have been appropriate in a given case. Thus, in *Northern Pacific Railway Co. v. McComas,* 250 U.S. 387 (1918), this Court said that while the courts should not take up the adjudication of the claims pending in the land office, there existed a related jurisdiction which the courts could exercise before final agency action, in that they could protect a possession lawfully acquired or restore one wrongfully interrupted, "*for that is a matter which is not confided to the Land Department, and may be dealt with by the courts in the exercise of their general powers.*" Here the injunctive orders were necessarily based (because of the doctrine of abstention) on considerations other than the determination of the issues of title and possessory right which were pending in the land office and therefore were made upon the sole ground that the claim's validity was being so tested in the agency and that continued mining of the mineral substance would cause irreparable damage to the land. (active mining of mineral will always irreparably damage the land.)

Far from protecting a possession lawfully acquired, or restoring one wrongfully interrupted, the limits set

in *Northern Pacific Railway Co. v. McComas (supra)*, and which would have been true restoration or preservation of *status quo,* the District Court's orders gave the government almost all the relief it would have been entitled to if it had obtained the ultimate judgment of a permanent injunction against the defendants. They *stopped* the mining. And this result was reached with no opportunity for the mining claimants to show agency error or even probable validity of their claim, because of abstention and absence of a final agency decision ripe for review.

Had the agency felt the need to expedite its final decision, the Secretary could have exercised his supervisory power at any time to make a preliminary decision instantly effective (43 C.F.R. sec. 1840.0-9(a) and (d)) or indeed to decide the case in the first instance.

2. The precedent created by the decision of the Court of Appeals affirming the preliminary injunctive order of the District Court will affect *all* owners of unpatented mining claims on which there is actual mineral production and thus the entire segment of the mining industry on claims on the public domain, for such an election (to contest) by the government, followed by the filing of suits for injunction accompanied by applications for similar preliminary injunctions can and will have a devastating effect on the entire mining industry engaged in mining or unpatented claims.

Issuance of such *status quo* injunctions will irreparably damage claimants of locations made for minerals to which the "marketability" rule of *Coleman (supra)* may apply, for many of them will necessarily lose their capacity to prove discovery of valuable mineral as required under the general mining law to sustain a mining

location because of suspension and loss of ability to market profitably or suspension and loss of any position in the market at all, and resulting from such interim injunctive orders. Such loss is tantamount to loss of the claim and its property and possessory right. While advantge of the situation might not be taken by the government, as discussed in the Circuit Court's opinion, this would not control other private parties who have every right to take advantage of the loss of discovery by a prior locator. It must be realized that we are speaking of *valuable* deposits, that the "rule of marketability" has been declared applicable to *all* minerals (*Converse v. Udall,* 399 F. 2d 616 (9th Cir.) 1968), and that the Department, since *Coleman,* insists that marketability means the presence of n erals presently valuable in an economic sense. *United States v. Swain, A-30926, dec. Dec. 30, 1968; United States v. Verru, A-30618, dec. Sept. 17, 1968.*

3. More important, though, is the absence of due process of law, contrary to the 5th Amendment of the Constitution, resulting from the doctrine of abstention or holding of hand procedure as it has been extended and here applied. The United States Attorney represented to the District Court upon the application for a preliminary injunction that it would be several years [R. Vol. 5] before a final agency decision on validity of the claim could be expected. The election by the government to first file a contest complaint in the land office under the procedures of 43 C.F.R. sec. 1852.2 *et seq.,* accorded to the agency the right and duty to exclusively determine validity. As a consequence of the application of the doctrine, the District Court must necessarily have granted the injunctive relief solely on the basis of (1) the mere pendency of the government-initiated contest,

and (2) threatened irreparable injury to the land from continued active mining.

The location of a valid mining claim segregates the selected land from the public domain and confers the right of exclusive possession upon the locator. The claim is property in the fullest sense of the word. *Wilbur v. United States, ex rel. Krushnic,* 280 U.S. 306, 316-317 (1930).

Suspension of active mining for several years can be catastrophic to a claim owner. His valuable property has been taken without opportunity for him to be heard by the Court on the issue of validity. Considering the possible use of the procedure against *any* operating unpatented mine, there exists a real threat to heretofore supposed and assured tenures and possessory rights for mining under the general mining laws. It is not limited to common variety minerals. The potential effect of the procedure is alarming.

This Court should either modify the doctrine of abstention to permit District Courts to consider and weigh evidence of probable validity in such circumstances, or should clearly extend the doctrine to prohibit such preliminary injunctive relief or actions of this nature until such time as there is a final agency decision that the mining claim is not valid.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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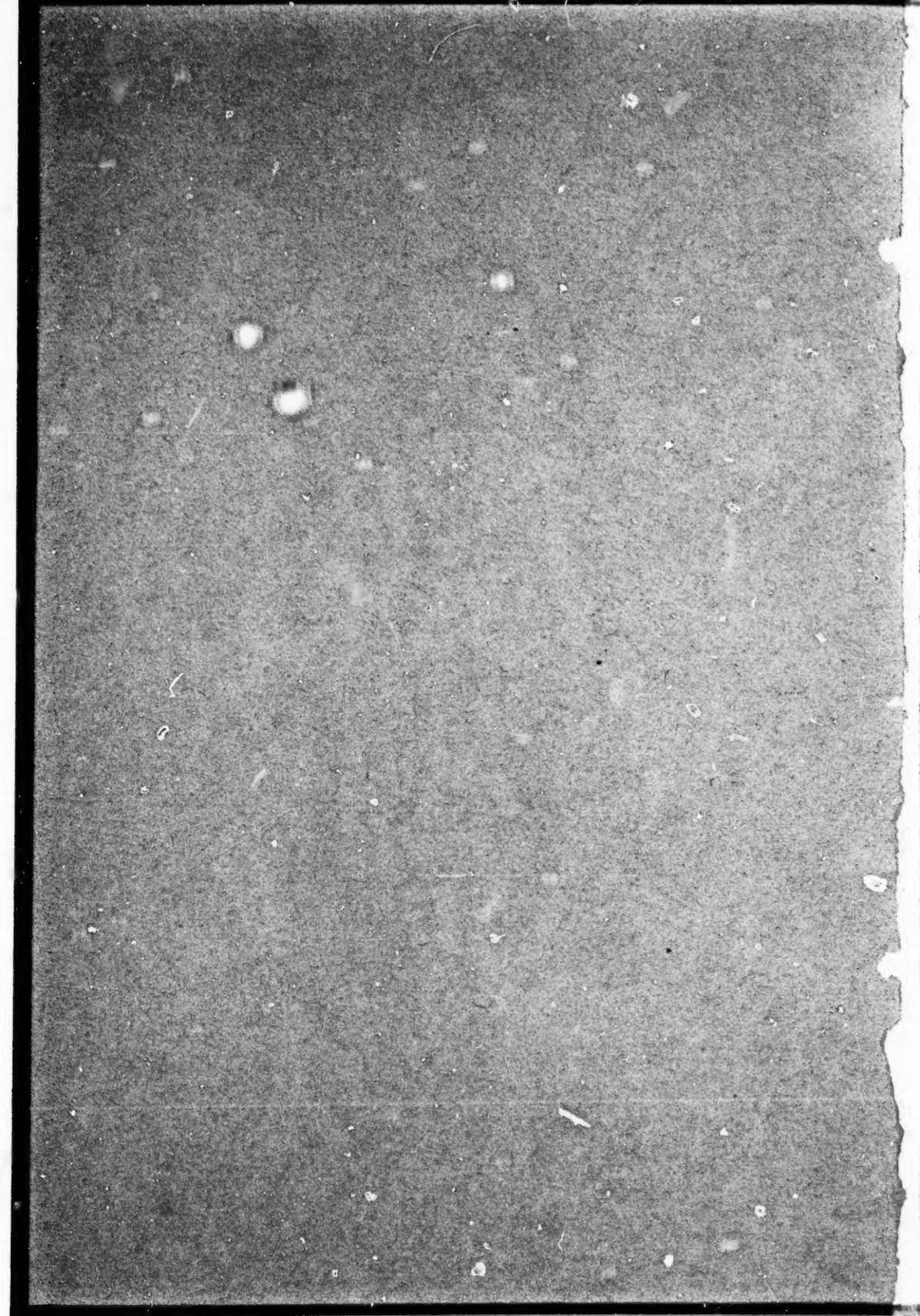
Attorneys for Petitioners.

March, 1969.



APPENDIX I.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

United States of America, *Appellee,* vs. E. Arthur Barrows, Esther Barrows, John B. Lonergan, Big Bear Rock and Materials Company, B. R. Seaman, also known as Bernard R. Seaman, individually, B. R. Seaman as General Manager of Big Bear Rock and Materials Company, B. R. Seaman as President and General Manger of Berni-Lee, Inc., a California Corporation, doing business under the name of Big Bear Rock and Materials, Berni-Lee, Inc., a California Corporation, H & W Leasing, a California Corporation, Douglass Hayes and Joyce Ann Hayes, *Appellants.* No. 22,-691.

[December 20, 1968]

Appeal from the United States District Court for the Central District of California.

Before: BARNES and HAMLEY, Circuit Judges, and McNICHOLS, District Judge.*

HAMLEY, Circuit Judge:

The United States brought this action to recover damages and obtain injunctive relief in connection with the operation, by defendants, of a sand and gravel mining and processing plant on lands in the San Bernardino National Forest. The defendants include E. Arthur Barrows, locator of a mining claim for sand and gravel on such lands, and B. Robert Seaman, gen-

*The Honorable Ray McNichols, United States District Judge for the District of Idaho, sitting by designation.

eral manager of Big Bear Rock and Materials Company which, as lessee, conducts a sand and gravel operation on the asserted claim.

The district court entered an order denying defendants' motion for summary judgment dismissing the action for lack of jurisdiction. In the same order, the court granted the Government's motion for a temporary injunction conditionally restraining defendants from damaging the surface lands and property in question pending an administrative determination of the validity of defendants' mining claim. Defendants appeal.

The relevant facts are not in dispute. Title to the lands in question, located in the San Bernardino National Forest, is vested in the United States as National Forest Lands save and to the extent that it is affected by the asserted mining claim referred to below. In 1953, Barrows and his wife posted and filed a location notice, later amended, whereby they purported to locate a mining claim for sand and gravel at a particular place in Grout Creek. Grout Creek is a seasonal stream emptying into Big Bear Lake in the San Bernardino National Forest. In 1960, the Barrows leased the claim to Seaman and his company, and the latter, with others, has since operated a large commercial sand and gravel mining and processing plant on the claim.

On March 18, 1964, the United States Forest Service initiated an administrative proceeding in the Riverside Land Office of the Bureau of Land Management of the Department of the Interior, to contest the validity of the claim for lack of timely discovery of a valuable mineral deposit prior to July 23, 1955.[1] The Hearing

[1]In order for a mineral claim on public lands to be valid it is necessary that the discovered mineral deposits be "valuable." 30

Examiner filed a decision on March 4, 1966, declaring the mining claim to be null and void for lack of a timely discovery of a valuable mineral deposit. The contestees in that proceeding, who include some of the defendants in the case now before us, took a timely appeal to the Director of the Bureau of Land Management.

On June 8, 1967, while the appeal was pending before the agency, the United States commenced this action. The contest proceeding remained undecided at the time the district court entered the order here under review.

Defendants assert that the district court did not have subject matter jurisdiction of this action and that it therefore erred in issuing an interlocutory injunction and in denying defendants' motion for summary judgment dismissing the action. Defendants argue that until the agency has reached a final administrative decision as to the validity of the claim, the district court can have no jurisdiction of the controversy.

In its complaint the Government alleged that the claim was null and void and sought: (1) a preliminary and final injunction enjoining defendants from damaging the surface of the lands in question, from removing materials therefrom, and from maintaining thereon a sand and gravel processing plant; (2) an accounting for the materials removed to date and for damages for the conversion of such materials; and (3) damages for

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U.S.C. § 22 (1964). As of July 23, 1955, under 30 U.S.C. § 611 (1964), no deposits of "common varieties" of sand, stone, gravel, pumice, pumicite or cinders may be deemed a valuable mineral deposit within the meaning of the mining laws of the United States. *Palmer v. Dredge Corporation,* 9 Cir., 398 F.2d 791, 792, 795. It follows that if defendants did not discover valuable sand and gravel deposits on the lands in question prior to July 23, 1955, they do not have a valid claim.

conversion by defendants of "frontage materials" and realty from the lands.

The full relief requested could not have been granted without the court first determining the validity of the claim. In so determining, the court could not rely on the Hearing Examiner's decision referred to above since, an agency appeal having been taken, that decision is not final. See 43 C.F.R. § 1840.0-9(a) (1966). Thus, the court would have to decide de novo the same question which is pending before the proper administrative agency.

Therefore, it may be, as defendants contend, that until the agency has rendered a final administrative decision as to the validity of the mining claim, the district court is without subject matter jurisdiction to adjudicate that question in the course of considering all of the Government's requests for relief. But we need not, and do not, now decide whether defendants are right as to this. The order under review does not purport to adjudicate the validity of the mining claim, nor does it grant the Government any relief which requires such an adjudication.

The only relief that the district court granted the United States was a temporary conditional injunction restraining defendants from damaging the surface lands and property, and from removing dirt, sand, gravel and other surface materials thereon, until the trial and final determination of the court case or until the further order of the court. Neither the order nor the findings and conclusions upon which it is based purport to adjudicate the validity of the mining claim.

Quite to the contrary, the order was responsive to a Government motion for a conditional restraining order

to prevent irreparable injury to the land pending the outcome of the administrative proceedings. The court specifically found that defendants were removing vast quantities of sand and gravel beyond that which is seasonably replenished, "to the immediate, continuous and irreparable damage of [the] forest lands."

The district court had subject matter jurisdiction to grant relief of that limited character whether or not it also had jurisdiction, prior to a final decision in the contest proceeding, to adjudicate the validity of the claim. See *Northern Pacific Ry. Co. v. McComas,* 250 U.S. 387, 392; *Kennedy v. United States,* 9 Cir., 119 F.2d 564, 565.

Since, as we have held, the district court had jurisdiction to issue the temporary injunction, the court did not err in denying defendants' motion to dismiss the action for lack of jurisdiction.

The views expressed above also call for rejection of defendants' contention that, apart from the problem of subject matter jurisdiction, the district court should have stayed its hand until the administrative decision as to the validity of the claim was final. In fact, the district court has stayed its hand concerning the validity of the claim, whether it was required to or not. It has acted only to prevent what it found to be irreparable damage, pending an administrative (and perhaps thereafter, a judicial) proceeding on the validity issue.

Defendants argued orally to this court, but not in their briefs nor, apparently, in the trial court, that if they are restrained by court process from continuing the sand and gravel operation, they will lose what they now contend to be a valid claim. They predicate this

contention on the asserted fact that continued validity of the mining claim depends upon continued marketability of the sand and gravel. In response, counsel for the Government told this court, at oral argument, that if defendants had a valid claim when the injunction order was entered, it would be "completely unreasonable" for the Government to urge that loss of a market for the sand and gravel resulting from such injunction would prejudice the validity of the claim. We agree, and hold that the Government-sought temporary injunction may not be permitted to prejudice defendants' asserted rights in this way.

Defendants argue that they are entitled to operate the claim unless and until it has been finally determined to be invalid.

Their right to the claim, unless and until the claim is finally declared void, is a property right. *Adams v. Witmer,* 9 Cir., 271 F.2d 29, 33. Thus, until a final determination is made, the Government, short of a condemnation proceeding, is probably not entitled to enter upon the claim or to require defendants to move their plant.

It must be remembered, however, that the Government is the underlying property owner and, as such, has interests entitled to protection. Balancing the interests of each, we think the court had power to prevent defendants from causing irreparable damage to the land, pending determination of the validity of defendants' claim. We find nothing in the record which convinces us that the district court abused this power in granting the temporary injunction.

Defendants urge that the purpose of a preliminary injunction is to preserve the *status quo* pending final

determination of the action. They contend that the *status quo* is the last uncontested status which preceded the pending controversy. See *Tanner Motor Livery, Ltd. v. Avis, Inc.,* 9 Cir., 316 F.2d 804, 809.

As pointed out in *Tanner,* however, there are no hard and fast rules in this area, and the courts have considerable discretion in fashioning relief. In fashioning such relief it is not usualiy proper to grant the moving party, on a temporary basis, the full relief to which he might be entitled if successful at trial. Here, however, the Government did not seek, nor did the district court grant, the full relief to which the Government may be entitled after a full trial.

We hold that, under the circumstances of this case, where irreparable damage to the Government's property interest was threatened, the court did not abuse its discretion in granting temporary relief which, in effect, disturbed the *status quo.*

Affirmed.